Supreme Court, U.S.
FILED
MAR 18 1996
CLERK

(5)

No. 95-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GENERAL MOTORS CORPORATION,

Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY OF THE PETITIONER

TIMOTHY B. DYK
(Counsel of Record)
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

JOHN C. DUFFY, JR.
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

Counsel for Petitioner

11 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY OF THE PETITIONER	1
CONCLUSION	7

TABLE OF AUTHORITIES

Page

Cases

Amerada Hess Corp. v. Director, Div. of Taxation, 490 U.S. 66 (1989) 3,4
Associated Industries of Mo. v. Lohman, 114 S. Ct. 1815 (1994) 2, 4, 5
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) 2, 3
Brimmer v. Rebman, 138 U.S. 78 (1891) 2
Buckeye Int'l, Inc. v. Limbach, 595 N.E.2d 347 (Ohio 1992) 1
Cleveland Gear Co. v. Limbach, 520 N.E.2d 188 (Ohio 1988) 1
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 3
Fulton Corp. v. Faulkner, 64 U.S.L.W. 4088 (U.S. Feb. 21, 1996) 4, 5
Henneford v. Silas Mason Co., 300 U.S. 577 (1937) 4
MCI Telecommunications Corp. v. Limbach, 625 N.E.2d 597 (Ohio), *cert. denied*, 115 S. Ct. 77 (1994) 1
Saltonstall v. Saltonstall, 276 U.S. 260 (1928) 1
Tug Buster Bouchard Corp. v. Wetzler, 635 N.Y.S. 2d 803 (N.Y. App. Div. 1996) 6
West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) 2

Statutes

Ind. Code § 6-2.5-4-5(c) 6
Ohio Rev. Code Ann. § 5727.33 4
Ohio Rev. Code Ann. § 5727.38 . . . . . 4, 5
Ohio Rev. Code Ann. § 5739.025 5
Ohio Rev. Code Ann. § 5741.02(A) 2

TABLE OF AUTHORITIES (Cont'd)

Page

Ohio Rev. Code Ann. § 5741.02(B) 5
Wash. Rev. Code § 82.12.022(1) 6
Wash. Rev. Code § 82.12.022(4) 6

Miscellaneous

R. Stern, *et al.*, SUPREME COURT PRACTICE
§ 3.16, at 121 (7th ed. 1993) 1

REPLY OF THE PETITIONER

The conflict between the decision below and this Court's Commerce Clause precedents, and the importance of this case, are highlighted by Respondent's Brief in Opposition ("Opp.").

1. Respondent claims that GM waived its constitutional arguments as a matter of Ohio law. *See* Opp. 7-11. We are at a loss to understand Respondent's theory of waiver: He admits that GM below urged that discrimination between out-of-State purchases and in-State purchases from local utilities violated the Commerce Clause; that is exactly the same argument GM urges here. Respondent did not urge waiver below, nor could he have done so.[1] In any event, the court below did not rest on any such theory: This Court has made clear that where the highest state court, as here, expressly considers and determines a federal issue, "the Supreme Court does not inquire into the framing of the issue by the litigant in the first instance." R. Stern, *et al.*, SUPREME COURT PRACTICE § 3.16, at 121 (7th ed. 1993); *Saltonstall v. Saltonstall*, 276 U.S. 260, 267-68 (1928).

Even when Respondent does turn to the merits of the decision below (Opp. 11-18), he barely mentions the decision below, and for the most part does not defend the reasoning offered by the Ohio Supreme Court.

---

[1] As quoted by Respondent (Opp. 7-8), GM's specification of error before Ohio's Board of Tax Appeals presented precisely the Commerce Clause and Equal Protection Clause issues presented by the Petition. In any event, all that Ohio law requires is a general statement of the legal theory, as Respondent's own cases confirm. *Cleveland Gear Co. v. Limbach*, 520 N.E.2d 188, 192 (Ohio 1988) (specification "that the application of R.C. 5711.16 deprives [appellant] of equal protection of the law in violation of the United States and Ohio Constitutions" held sufficient). Indeed, the Ohio Tax Commissioner has been chided more than once by the Ohio Supreme Court for urging "a hypertechnical reading of the notice [of appeal]." *MCI Telecommunications Corp. v. Limbach*, 625 N.E.2d 597, 599 (Ohio), *cert. denied*, 115 S. Ct. 77 (1994) (*quoting Buckeye Int'l, Inc. v. Limbach*, 595 N.E.2d 347, 350 (Ohio 1992)).

2. In the Petition (Pet. 8-11), GM showed that the supreme court's justification for the constitutionality of the tax exemption — that it favors only some in-State sellers — is squarely in conflict with a long line of this Court's cases, beginning with *Brimmer v. Rebman*, 138 U.S. 78 (1891), which hold that a State may not save a tax from unconstitutionality by favoring only some, but not all, in-State commerce. Respondent relegates these cases to a footnote (Opp. 14 n.4), explaining that in each of these cases, "the imposition of tax depended upon the place of origination or other business activity." (Opp. 14). While that is certainly true, Respondent fails to note that in this case, the exemption from tax also "depend[s] upon the place of origination or other business activity" — the exemption is only available to purchases made from *local* public utilities. The supreme court's decision is in square conflict with the *Brimmer* line of cases.

3. GM also showed (Pet. 11-14) that the supreme court's ruling that GM lacked standing to challenge the constitutionality of the use tax conflicts with several decisions of this Court.[2] Nowhere in Respondent's Brief does he attempt to defend the supreme court's standing ruling. Respondent's silent concession of a conflict on this important issue is yet another confirmation of the untenable nature of the decision below.

4. Rather than defend the decision below, Respondent elects to offer new justifications for the result — justifications not adopted by the Ohio court. The use tax exemption which GM challenges is not, as Respondent claims, "part of a separate system of taxing and regulating natural gas companies and other public utilities." (Opp. 1; *see also* Opp. 6, 10, 16-17) And the Ohio Supreme Court did not so hold. Rather, the use tax is, by its terms, imposed on the *consumers* of goods purchased outside of Ohio (including natural gas) and used within Ohio. Ohio Rev. Code Ann. § 5741.02(A). The exemption at issue here is only

---

[2] *E.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 266-67 (1984); *Associated Industries of Mo. v. Lohman*, 114 S. Ct. 1815, 1819 (1994); *West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2209 (1994).

available for natural gas purchases from local public utilities, and is *never* available when the gas is purchased outside the State of Ohio. That is pure discrimination against all interstate commerce in natural gas.

5. Respondent relies heavily on the "fundamentally different nature of the utility business" from the gas marketing business. (Opp. 11-18) While the Commerce Clause certainly allows states to tax different businesses differently in appropriate circumstances, the tax here is not on utility businesses or gas marketers. It is a use tax imposed on consumers of a particular item of interstate commerce — natural gas. Both the taxpayers and the product taxed are identical whether the purchase is made from an out-of-state seller or an in-state public utility. The exemption is constructed to favor only one class of natural gas purchases — those from Ohio-based public utilities. "[D]iscrimination between in-state and out-of-state *goods* is as offensive to the Commerce Clause as discrimination between in-state and out-of-state *taxpayers*." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 n.8 (1984) (emphasis added).

6. There is no authority supporting differential treatment under the circumstances of this case. Respondent's reliance on *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66 (1989) (Opp. 12-13) is plainly misplaced. In that case, this Court upheld New Jersey's Corporation Business Tax as applied to several major oil companies. Each of the companies wished to deduct from its New Jersey taxable income its federal windfall profit taxes on crude oil production (which activities were not associated with New Jersey, but with oil-producing states). The companies argued that by denying the deduction for windfall taxes, the New Jersey tax violated each of the four prongs of the *Complete Auto* Commerce Clause test (*see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)). As to the "discrimination" prong of *Complete Auto*, the companies claimed that the tax discriminated "against oil producers who market their oil in favor of independent retailers who do not produce oil," and thus had no windfall profits. *Amerada Hess*, 490 U.S. at 78. This Court said that the companies' argument "miss[es] th[e] essential point" of

the Commerce Clause (*id.* at 77), because state lines were irrelevant to a distinction between producers and retailers. The claimed discrimination rested on "the nature of their businesses," not "the location of their activities," since both producers and retailers "may operate both in New Jersey and outside New Jersey." *Id.* at 78.

Respondent claims that the tax statute here, like the one sustained in *Amerada Hess,* rests simply on "the nature of," not "the location of," the seller. (Opp. 13) But that is not so: Purchases of natural gas from out-of-State public utilities are never exempt from use tax, and Respondent does not claim otherwise. By definition, out-of-state utilities do not "own or operate the transportation and distribution equipment and deliver the natural gas to consumers *in Ohio.*" Pet. App. 3a (emphasis added). The favoring of local interests could not be clearer.

7. Respondent also attempts to defend the discriminatory tax exemption as somehow compensatory for the "gross receipts tax imposed on utilities generally (but not on unregulated gas marketers)." (Opp. 11 n.3, *citing Associated Industries of Mo. v. Lohman,* 114 S. Ct. 1815, 1824-25 (1994); *see also* Opp. 16) The court below did not adopt this reasoning, and the argument evidences a serious misreading of this Court's Commerce Clause precedents. This Court has repeatedly held that to be sustained as valid compensating taxes, the two taxes being compared must "fall on substantially equivalent events." *Fulton Corp. v. Faulkner,* 64 U.S.L.W. 4088 (U.S. Feb. 21, 1996). *See also Associated Industries,* 114 S. Ct. at 1821.

Ohio's gross receipts tax on local public utilities, and its use tax on gas not sold by a local public utility, do not "fall on substantially equivalent events." The two taxes do not even fall on the same entities: The use tax on gas is imposed upon the buyer of gas; the gross receipts tax, on the utility. Ohio Rev. Code Ann. §§ 5741.02(B), 5727.33, 5727.38. However, this Court's decision in *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1937) "makes clear that actual incidence upon the same class of taxpayers is a necessary condition for a finding that two taxes are

complementary." *Fulton Corp.*, 64 U.S.L.W. at 4093 n.6. Furthermore, the rates of taxation are different — 5 to 7% for the use tax, 4.75% for the gross receipts tax. Ohio Rev. Code Ann. §§ 5739.025; 5727.38; *compare Fulton Corp.*, 64 U.S.L.W. at 4093. Respondent's attempt to defend the exemption on this ground demonstrates that he recognizes the presence of discrimination.

8. The decision below has serious ramifications for competition in the natural gas industry. Respondent recognizes (Opp. 11) that "[t]he players in the business of selling natural gas are natural gas marketers and natural gas utilities." These players have been competing in the burner-tip market ever since the "playing field" was deregulated in order to allow non-utility sellers to compete in the burner-tip market with local public utilities. (Pet. 2-3) Nonetheless, the decision below gives the State of Ohio, by its tax code, free rein to tilt that playing field in favor of its own local public utilities. Such parochialism only distorts the national market, and therefore cannot be tolerated under the Commerce Clause.[3]

9. The importance of this case to *all* interstate commerce is illustrated by the Brief *amicus curiae* of The Committee On State Taxation (COST) in support of the Petition. COST, as its *amicus* brief explains, is a nationwide organization of over 400 major corporate taxpayers, giving COST a broad and unique perspective on state tax laws. As COST points out, the issues presented in this case are critical and national in their importance, principally

---

[3] This case has also generated an *amicus* brief *opposing* certiorari from Enron Access Corp., a non-utility seller of natural gas. Enron's brief presents no constitutional arguments opposing certiorari, instead arguing points of Ohio law not at issue here. (Enron Br. 3) Ordinarily Enron should be expected to oppose discriminatory taxes upon its customers' purchases. But Enron is nonetheless allied with Respondent in this case because it wishes not to be classified, *for regulatory purposes*, as an Ohio public utility. Enron Br. 1-2 (calling its non-regulation "absolutely crucial" to Enron's interests).

because the tax scheme upheld by the Ohio Supreme Court "impedes purchasers' access to the national market by exempting sales by local businesses, but taxing out-of-state sales." COST Br. 2. The issue is thus important not only to a particular industry, but to the national marketplace as a whole.

10. Finally, the issues presented here are also recurring. Despite Respondent's suggestion to the contrary (Opp. 6), *amicus* COST points out that at least one other state (New York) has tried to implement a similar discrimination. *See* COST Br. 3-4 (discussing *Tug Buster Bouchard Corp. v. Wetzler*, 635 N.Y.S. 2d 803 (N.Y. App. Div. 1996)). The State of Washington, too, has a similar exemption scheme for natural gas purchases which is constitutionally suspect.[4] So does the State of Indiana.[5] Respondent himself predicts "a tidal wave of commerce clause challenges" (Opp. 17-18) if the challenged tax is found unconstitutional. While this is obvious hyperbole on Respondent's part, he plainly concedes that the issues presented here are not unique to Ohio, and will arise in the future.

---

[4] The State of Washington imposes a use tax upon "the privilege of using natural gas or manufactured gas within this state as a consumer." Wash. Rev. Code § 82.12.022(1). However, Washington exempts the consumer from use tax "if the person who sold the gas to the consumer has paid a tax under [Wash. Rev. Code §] 82.16.020 with respect to the gas for which exemption is sought." Wash. Rev. Code § 82.12.022(4). The "tax under [Wash. Rev. Code §] 82.16.020" is the gross receipts tax on local public utilities.

[5] Indiana exempts from its generally applicable sales and use tax certain purchases of natural gas from a public utility. Ind. Code § 6-2.5-4-5(c). Identical gas purchased from all other sources is not similarly exempted.

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition and in the brief *amicus curiae* of The Committee On State Taxation, certiorari should be granted.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
GREGORY A. CASTANIAS
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

JOHN C. DUFFY, JR.
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

Counsel for Petitioner

March 13, 1996